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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM EUGENE aka WILLIAM EUGENE BARNES, Defendant and Appellant.	D044304 (Super. Ct. No. SCD176947)

APPEAL from a judgment of the Superior Court of San Diego County, William D. Mudd, Judge. Affirmed.

In this case we address the question of whether an upper term sentence imposed by a trial court as part of a plea bargain in which the trial court struck two "strike" priors to avoid a life sentence violated William Eugene's Sixth Amendment right to a jury trial on sentencing factors. Since the jury expressly found the strike priors true and the trial court based its upper term determination on the decision to strike two of those priors (thus

avoiding a 25-year-to-life sentence), we will find that Eugene's constitutional right to a jury trial was not violated.

As part of a plea agreement with the court Eugene pled guilty to one count of offering to sell a controlled substance and one count of possessing cocaine base for sale. (Health & Saf. Code, §§ 11351.5 & 11352, subd. (a).) The trial court agreed not to impose a sentence of more than 13 years. Eugene did not admit the prior convictions alleged in the information and the truth of those allegations was resolved in a jury trial. The jury found true three prison priors within the meaning of Penal Code[1] section 667.5, subdivision (b) and three serious/violent felony prior convictions within the meaning of section 667, subdivisions (b)-(i).

At the sentencing hearing, the trial court struck two of the serious/violent felony prior convictions and imposed a 13-year sentence consisting of the upper term for count 1, doubled pursuant to section 667, subdivision (e), plus three years for the prison priors.

Eugene appeals, challenging only the imposition of the upper term for count 1. Eugene argues that under the principles of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*),[2] the court erred in selecting the upper term. Eugene further contends the court would be required on remand to impose only the lower term. We will

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 The issue of *Blakely's* application to California's determinate sentencing schemes currently pending before the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

find that *Blakely* does not apply to the sentence imposed in this case and affirm the judgment.

DISCUSSION[3]

Eugene contends the trial court's decision to impose the upper term of five years for count 1 violated his right to a jury trial on the factor used to justify that sentence. He argues that *Blakely, supra,* ___ U.S. ___ [124 S.Ct. 2531], not only applies to upper term sentences in California, but that it requires the trial courts to impose only lower term sentences unless the sentencing factors are admitted or found true by a jury, beyond a reasonable doubt.[4]

A. Application of the Waiver Rule.

The attorney general contends Eugene has waived his right to raise any challenge to the upper term sentence. Relying primarily on *People v. Scott* (1994) 9 Cal.4th 331, 353-354, the attorney general argues Eugene had the opportunity to object in the trial court and failed to do so. The argument is premised on the fact that the precursor decision to *Blakely, Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), had already been decided before the sentencing in this case. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060-1061; *U.S. v. Cotton* (2002) 535 U.S. 625.)

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3 Given the limited nature of the issue presented on appeal, we find it unnecessary to include the traditional statement of facts in this opinion.

4 In light of our conclusion that the upper term sentence in this case does not run afoul of the *Blakely* decision, we decline to address Eugene's novel argument that *Blakely* compels a lower term sentence.

In *People v. George* (2004) 122 Cal.App.4th 419 (*George*), we held the waiver rule inapplicable to the sentence in that case on the pragmatic basis that prior to *Blakely, supra,* ___ U.S. ___ [124 S.Ct. 2531], there were no published cases hinting that *Apprendi, supra,* 530 U.S. 466, would apply to an upper term determination. The present case, however, presents a much closer question on the issue of waiver.

In this case, Eugene entered into a plea agreement with the trial court. In that agreement the trial court promised it would strike at least two of the serious/violent felony prior convictions and would not impose a sentence greater than 13 years. Eugene received precisely the sentence for which he bargained. Under the circumstances of this case, we believe it is appropriate to apply the waiver rule as announced in *People v. Scott*, *supra*, 9 Cal.4th 331. Eugene was on notice of the potential sentence when he entered into the agreement with the court in order to avoid the possible sentence of 28 years to life he could have received based on his convictions and true findings on the recidivist allegations.

Eugene never objected to the imposition of the upper term for count 1. Since he failed to object in the trial court and received the sentence he bargained for, it is appropriate to apply the waiver rule and prevent him from raising that objection for the first time on appeal.

Since reasonable minds can differ on whether the waiver rule should ever apply to *Blakely* error, we will address the merits of Eugene's contention that imposition of the upper term violated his right to a jury trial.

B. Blakely Does Not Apply To The Sentence In This Case

In *George*, *supra,* 122 Cal.App.4th 419, this court held that the Sixth Amendment right to a jury trial, as interpreted by *Blakely, supra,* ___ U.S. ___ [124 S.Ct. 2531], applied to a trial court's determination of aggravating factors, which would justify imposition of an upper term sentence. (But see dis. opn. of Benke, J., in *People v. Lemus* (2004) 122 Cal.App.4th 614.) The court in *George* and the majority in *Lemus* dealt with upper term sentences which were based on sentencing factors which had not been admitted or found true by a jury and were not within the facts necessarily required for a finding of guilt for the charged offense. (Cal. Rules of Court (CRC), rule 4.421.) The sentencing in this case presents a totally different set of circumstances.

Here the trial court struck two serious/violent felony prior convictions in order to avoid imposing a 28-year-to-life sentence on the counts admitted and the prior convictions found true by the jury. Under section 1170, subdivisions (a) and (b), and CRC rules 4.406(b)(10), 4.408 and 4.421(a)(7), the trial court, in deciding whether to impose the statutorily authorized upper term, may consider the fact that the convictions and true findings would subject the defendant to a greater punishment than the trial court deems appropriate. Striking the proved allegations in order to impose a lesser punishment justifies the trial court's decision to impose the upper term on the count to be sentenced and the remaining allegation.

In this case, the upper term selection was based literally on factors found true by the jury. When the trial court stuck two of the serious/violent felony prior convictions it conducted no impermissible factfinding. Rather, consistent with section 1170,

subdivisions (a) and (b), the court imposed a sentence authorized by the enabling statute and the relevant rule of court.

Eugene's right to have his sentence based upon factors which were admitted or found true by a jury was fully vindicated in this case.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

I CONCUR:

McCONNELL, P. J.

BENKE, J.

I concur in the result but not the rationale used by the majority.

Here, we march on through the thicket of *Blakely* (*Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2531] (*Blakely)* that we created by declaring unconstitutional basic underpinnings of our determinate sentencing scheme. (*People v. George* (2004) 122 Cal.App.4th 419*; People v. Lemus* (2004) 122 Cal.App.4th 614.) The result is production of "*Blakely* waiver issues," consecutive sentence issues and permutations we can only surmise at this point in time. As is evident here, we are also remanding cases with directions to adjust sentences, at the same time sending a clear message to trial courts that they should not be following the statutory discretion currently vested in them.

Before turning the sentencing structure of the state upside down, it is incumbent upon us to determine if there is an interpretation by which the statutory structure passes constitutional muster. If there is, we are obligated to uphold the constitutionality of our laws. (*Myers v. Philip Morris Companies, Inc*. (2002) 28 Cal.4th 828, 846-847.) The rationale for such a rule is self-evident in the further confusion we now cause. If the statutory scheme is ultimately upheld in California, I seriously doubt we can undo some of the mischief we are causing.

I certainly do not purport to have any better ability to predict the ultimate outcome of the constitutional challenge to California's sentencing laws than my colleagues possess. We are all dealing with the same challenge. Respectfully, however, I offer an alternative conclusion. Although more can be said, I summarize as follows:

Blakely's questioned language is explained in *Harris* v. *United States* (2002) 536 U.S. 545, 561-565 [122 S.Ct. 2406], the authority on which the language rests. In *Harris* the court explains that the facts reflected in the jury verdict are the elements of the crime. When an individual has been found guilty, the elements have been found true and the requirements of the Fifth and Sixth Amendments have been satisfied. Thereafter a sentencing court may use facts relevant to the crime or defendant. These are sentencing factors. Unlike facts constituting elements, these facts need not be found true by a jury. As long as these sentencing factors are not used to take the sentence beyond the maximum term allowed by the statute for which the defendant was found guilty, there is no constitutional infirmity.

Moreover, a sentencing structure that allows the judge discretion to sentence below the statutory maximum allowed by the jury is permissible. Our tripartite statutes provide such a structure by setting ranges within which the trial court must exercise guided, or in the language of Penal Code section 1170, subdivision (a)(1), "specified" discretion. Statutory history supports such an interpretation. The original version of the determinate sentence law, Senate Bill 42, required the sentencing judge to impose the middle term. While the court had jurisdiction to impose either the upper or lower term, it had no discretion to do so unless the defendant or the People brought a formal motion. Assembly Bill 476 substantially rewrote the determinate sentencing laws. Among other things, it widened the discretionary ranges and removed the requirement of the formal motion. The result is that the judge now has the jurisdiction *and* discretion at the outset of the sentencing procedure to select *any* of the three possible sentences in the statute and

the judge may do so without a request by anyone. (Sen. Bill No. 42 (1975-1976 Reg. Sess.) as introduced; Assem. Com. on Crim. J., Analysis of Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended Mar. 17, 1977, p. 4; Assem. Com. on Crim. J., Analysis of Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended Apr. 19, 1977, p. 2; Assem. Office of Research, 3d reading analysis of Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended May 2, 1977, p. 3.; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 476 (1977-1978 Reg. Sess.) as amended June 6, 1977, p. 13; see also Pen. Code, § 1170, subd. (a)(3).) After weighing the sentencing factors, if neither the aggravating nor mitigating factors prevail, the court must sentence on the middle term. Even if the judge believes the aggravating factors outweigh the mitigating, he or she can still impose the middle term. This discretionary aspect of our sentencing laws can be readily distinguished from those structures that *require* an increase in sentence based upon finding a particular fact, thus running contrary to *Blakely*.

As for the problem identified in *Blakely*, if there is an enhancement that would take a California defendant outside the sentencing range, it must be pleaded and proved. (Pen. Code, § 1170.1(e).) Thus California's enhancement requirements further implement safeguards against the abuses of concern in *Blakely*.

My position is quite simple. We are charged with upholding our laws and interpreting them as constitutional where we can. Unless *Harris* is overruled, we can. And thus we are compelled by law to do so.

Therefore, while I agree with the conclusions reached by my colleagues, I do so on the basis that sentencing structure does not violate the tenets of *Blakely* and therefore

there is no *Blakely* issue to waive and the imposition of the upper term was proper whether or not the priors were factually determined by a jury.

BENKE, Acting P. J.